JUDICIAL REVIEW OF PUBLIC REGULATION[1]

In the discussion of government regulation of public service corporations, attention has been centered upon the organization, powers, and duties of administrative commissions. Many have forgotten that the success of government regulation depends in large measure upon the attitude of the courts and the scope of judicial review. No matter how perfect the plan enacted by the legislature, it may soon resemble a toothless invertebrate if judicial review is unlimited; and excellent results may be obtained under an inferior plan, if the courts support and strengthen it.

It is generally admitted that there should be some method whereby the acts of a commission may be reviewed by the courts. The theories upon which our political system is based require that it shall be possible for a person injuriously affected by a decision of an administrative body to appeal to the courts at some stage of the proceeding. The question is not, therefore, whether there should be any judicial control, but rather how far that control should extend, and upon what grounds the courts may set aside the decisions of co-ordinate branches of the government.

JUDICIAL QUESTIONS

Probably all will agree that the courts should decide whether an act of an administrative body violates a constitutional provision of the state or of the United States. The right to a decision upon this point is unquestioned. The finding of the court may be wrong, but it is the law until the constitution is changed or the court reverses its opinion. This principle is of general application, for an act of the legislature may be declared unconstitutional just as effectually as an administrative order.

It is likewise clear that the courts should determine whether the regulative body is acting within the authority delegated to it by the legislature or by the constitution. Any order that is issued

[1] This article embodies the substance of an address before the Western Economic Society, at Chicago, March 1, 1912.

without such authority is illegal, and the determination of the question of authority is a judicial function. If authority may be exercised under certain conditions, the courts will determine whether those conditions have been met.[1]

In the third place, it is proper that the courts should have the right to review the procedure leading up to the issuance of an order or the performance of an act by a regulative authority, so that they may determine whether the course followed was regular in every way.

In every one of these cases, the courts are called upon to apply a law already existing to a specific instance. But in no case are the courts supposed to enact a new law, or substitute a perfect order for an imperfect one, or declare a statute or order illegal merely because in their opinion it is unwise or inexpedient.[2] They may not add one jot or one tittle on their own initiative. As the United States Supreme Court has said (*Prentiss et al.* v. *Atlantic Coast Line Co.*, 211 U.S., 210, 226):

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. . . . . Litigation cannot arise until the moment of legislation is past.

SCOPE OF COURT REVIEW

We have now reached the point of divergence. There are those who claim that the courts are fully competent to regulate public service corporations, even to the extent of fixing rates. In a recent decision by the New York Court of Appeals, it was said (*People ex rel. Joline et al.* v. *Willcox et al.*, 194 N.Y., 383, 387):

> If a judicial tribunal is competent to decide that the exaction of five cents is extortionate, and that a tender of three cents is inadequate, it is difficult to see why it may not be empowered to also decide that four cents is a reasonable and proper rate, and that such rate shall continue until circumstances so change that the judgment of the tribunal may again be invoked. The obligation of a carrier to carry at a reasonable rate, in the absence of any statutory rate, rests on statute or on the common law; the decree of a court does not create an obligation, but measures an existing one.

[1] *Interstate Commerce Commission* v. *N. Pacific Ry. Co.*, 216 U.S., 538.

[2] *Interstate Commerce Commission* v. *Ill. Central R.R. Co.*, 215 U.S., 452.

It is true that the obligation to supply service at reasonable rates is not new and that it has existed for generations; but it is equally true that appeal to the courts, as a method of securing reasonable rates and adequate control, has been seldom used and has proven ineffectual, for reasons which will be discussed later.

Others, who recognize the impossibility of securing effective control through ordinary judicial procedure, favor the creation of commissions, but insist that the courts should be empowered to determine whether in their opinion an order of a regulative authority is wise, expedient, and reasonable, and whether the evidence justifies the order. Those who favor limited judicial review assert that such a policy would be destructive of efficient regulation, and that it is not proper for a court to nullify an order of a commission simply because its judgment of what is wise and reasonable differs from that of the commission. Between these two ideas there is a third, which requires that orders be upheld by the courts unless they are unsupported by any evidence of record in the case. It is evident that there is room here for great difference of opinion as to the amount of discretion which should be allowed to the regulating body. Even in those states that have expressly provided for an appeal to the courts, there is considerable difference between the decisions.

VARYING STATE PRACTICE

In Oklahoma, where the constitution provides that the Supreme Court shall determine the "reasonableness and justness of the action of the commission" and that it "shall be regarded as prima facie just, reasonable, and correct," in practice the court considers the matter *de novo*, acts as if it were a commission or the legislature and issues an order such as the commission ought to have made. Apparently, consideration is given to the special knowledge and skill of the commissioners,[1] but any presumption in their favor may be easily rebutted.[2] Their orders have not the same standing as decisions of lower courts considered upon appeal.

[1] *A.T. & S.F. Ry. Co.* v. *State*, 23 Oklahoma, 510; *Ft. Smith & W. Ry. Co.* v. *State*, 108 Pac. Rep., 407.

[2] *Twin Valley Tel. Co.* v. *Mitchell*, 27 Oklahoma, 388; 113 Pac. Rep., 914; *St. Louis & S.F. R.R. Co.* v. *Reynolds*, 26 Oklahoma, 804; 110 Pac. Rep., 668; *St. Louis, I.M. & S. Ry. Co.* v. *State*, 111 Pac. Rep., 396.

The courts in other states refuse to go so far. For example, the Supreme Court of Maine recently said in relation to a decision of the Railroad Commissioners, apportioning the expense of repairing a bridge between a railroad company and the town: "Their apportionment must stand unless manifestly illegal or unjust."[1] Similarly, the Kansas Supreme Court said, relative to an elimination of a grade crossing: "Its [Board of Railroad Commissioners] decision, in the absence of exceptional circumstances, must be final. Of course, if its action had been arbitrary or capricious, the courts could afford relief. . . . . The court cannot presume to pass upon the fitness of the plans adopted."[2]

Numerous other decisions could be cited which show a strong tendency in many states away from the theory of broad court review. In Minnesota, the Supreme Court said that if the statute intended that the state district court should try a matter decided by the commission, without regard to the findings of the state commission, the act would be unconstitutional. The judge writing the opinion went on to say that the court may review such findings only so far as to determine whether the rates fixed "are so unreasonable as to be confiscatory, just as an appellate court reviews the verdict of a jury for the purpose of determining whether it is so excessive that it cannot stand," and that every reasonable doubt should be resolved in favor of the findings; all this notwithstanding the fact that the statute provided the district court should determine questions of fact as well as of law.[3]

In a Louisiana case, the following doctrine was laid down:

> The mere reference of disputed issues between the parties to this court for adjudication was not intended to constitute it an "administrative" board, revisory in character over the orders and conclusions of the Commission. Our action is judicial, not administrative. It was not intended that we should substitute our judgment for that of the Commission every time there is a dispute touching the particular place on a line of railroad where it would be best for the public interest that a station or a depot should be placed.[4]

[1] *Inhabitants of Orono* v. *Bangor Ry. and Electric Co.*, 105 Me., 428.

[2] *State* v. *Railway Co.*, 81 Kansas, 430. Cf. *Matter of Amsterdam, Johnstown and Gloversville R.R. Co.*, 86 Hun, 578.

[3] *Steenerson* v. *Great Northern Ry. Co.*, 69 Minn., 353.

[4] *Railroad and Steamship Co.* v. *Railroad Com.*, 109 La., 247, 263.

The Wisconsin Supreme Court, in a case involving the construction of a new railway station and the stoppage of trains thereat, ruled that the degree of proof necessary to warrant the reversal of a decision of the Railroad Commission was that required to prove fraud or a mistake in a written document. The court says that if it were sitting as a railroad commission, it would not issue the order in question; but as it found that competent and reasonable men might differ upon this point, the decision of the lower court upholding the commission would not be overturned.[1]

The United States courts, particularly the Supreme Court, have gone very much farther than any state court in their refusal to interfere with the orders or decisions of administrative bodies. A suit was brought before a circuit court in Pennsylvania to prevent the enforcement of a rate order of the Interstate Commerce Commission. At that time the law provided that the orders of the commission could be suspended or set aside by the courts. The court said:[2]

> The fixing of rates as an incident to the regulation of commerce, being a non-judicial function, it follows that when the legislative branch has itself acted therein, or by proper delegation of its powers has acted through the executive branch, such action, provided no legal, constitutional, or natural right has been violated, is not to be suspended or vacated by a court. . . . .
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> It is therefore apparent that, when the question of suspending or setting aside an executive act comes before a court under such statute, the question is one of law, namely, whether the executive transcended its power or exercised such power without due regard to law. If, for example, there was a failure to comply with statutory requisites of notice, or to afford a statutory hearing, or the action taken was confiscatory—these are all elements a court might consider and in exercising such jurisdiction inquire into the facts to ascertain the real subject involved as throwing light upon the lawful or unlawful character of the order under review.

The learned judge then declares that the court's jurisdiction in the case at bar is the same as that in cases relating to fraud orders. This comparison is interesting in view of the great difficulty in getting the courts to review postal fraud orders issued by the Post-

[1] *Minn., St. Paul & Sault Ste. Marie R.R. Co.* App. v. *Railroad Com.*, 136 Wis., 146; also 116 Northwestern Rep., 905.

[2] *Phila. & Reading Ry. Co. et al.* v. *Interstate Commerce Com.*, 174 Fed. Rep., 687, 688-9.

office Department. Indeed, it is practically impossible to get the United States Supreme Court to review the acts of any executive department to determine questions of fact. In a well-known case, the court would not allow a finding of a master in chancery of a circuit court to upset the ruling of the Secretary of Commerce and Labor as to the place of birth of a Chinaman.[1]

The Supreme Court will not set aside an order merely because it is unreasonable. It must be so unreasonable that it violates a constitutional provision; it must be so unreasonable that it is confiscatory, and confiscatory "beyond any just or fair doubt." The burden of proof is upon the corporation affected; and in case of doubt as to the illegality of the act, a fair trial under the new rate should be given. Between an extortionate rate and a confiscatory rate, there is usually wide range. It is not a judicial function to determine what the reasonable rate should be, or to substitute the opinion of the court for that of an administrative body.[2]

The newly created Commerce Court has indicated its intention to go farther, to consider the weight of evidence, and to overturn the decisions of the Interstate Commerce Commission, unless the evidence in the case before them justifies the finding. If this position is sustained by the Supreme Court, it will have a serious effect upon the work of the commission. The expert knowledge and wide familiarity with public utilities, which are the result of years of experience, will count for little, for the commissioners may not use their own knowledge unless it agrees with evidence in the record. Facts garnered from other cases are not pertinent unless put in evidence in the case at bar. The testimony of witnesses may not be disregarded unless other witnesses are called who testify differently, although the commissioners may be certain from their experience that the evidence is not worthy of much consideration. Yet, everyone knows how easy it is to get "expert" evidence to support almost any proposition, and how important it is in order to judge of the weight of evidence to hear the testimony.

[1] *United States* v. *Ju Toy*, 198 U.S., 253.

[2] Cf. *City of Knoxville* v. *Knoxville Water Co.*, 212 U.S., 1; *Willcox* v. *Consolidated Gas Co.*, 212 U.S., 19.

WISDOM OF LEGISLATIVE ACTS NOT REVIEWABLE

Regarding court review of administrative acts, it should be pointed out in the first place that acts of the legislature may not be overturned by the courts upon the ground that, in their opinion, such acts are unwise, inexpedient, or unwarranted. This principle is too well known to need discussion. If, therefore, the legislature delegates its power to regulate corporations to an administrative body, and if the courts are to have the right to consider the reasonableness, propriety, etc., of its acts, the corporations thus obtain an additional method of review which they did not heretofore possess. It is generally supposed that their rights were already amply protected, and that existing constitutional guaranties were sufficient. The purpose of regulation is to curb the power of corporations, not to provide additional means to delay and prevent action.

Further, legislatures are not bound by rules of evidence. They are not required to have evidence or to follow it. They need not give hearings; they may act on their own initiative. If commissions are required to hold hearings so that any company likely to be affected may have an opportunity to be heard, it has greater protection than is guaranteed it under legislative control.

But someone may say: What if these commissions are unfair, are not guided by the evidence, and do not exercise good judgment; should it not be possible to appeal to a higher authority? The same question might be asked in relation to the legislature, but there is no appeal to the courts upon such grounds. Further, is it likely that administrative bodies will be less fair than legislatures? Is it not likely that a body created and selected for one specific purpose will perform this one function with as great efficiency, fairness, and wisdom as another which has a multitude of other duties to perform and is not in continuous session?

CONTROL OF COMMISSIONS

However, administrative bodies are not irresponsible autocrats, subject to no restraint and accountable to no one. In the first place, they are responsible to the person who appoints them, or to the electorate if they are elected. Their terms are comparatively short in most cases—much shorter than the terms of many judges.

If their decisions are manifestly unfair and improper, they may not be re-elected or reappointed. There is usually a method of removing them from office in case of gross incompetence.

Commissions are also responsible to the legislature in three ways. The very offices which they hold may be abolished; the authority under which they act may be curtailed; their decisions in any specific case or class of cases may be set aside, for an act of the legislature will supersede a decision of a commission. In these ways, commissions are subject to greater and more direct control than the legislature itself, and certainly to more control than the courts. A decision of the courts upon constitutional grounds cannot be set aside except in a laborious way and only after considerable time has elapsed. In many cases, indeed, this process is so difficult that a decision of the courts is final and practically beyond review.

ARGUMENT AGAINST BROAD REVIEW

Is it necessary, in addition to the above methods of control and the constitutional jurisdiction which courts have over administrative acts, to provide that the courts may also determine whether an order is wise, warranted by the evidence, and a reasonable exercise of the discretionary power conferred?

One reason why the courts should not be given unlimited authority to review orders of commissions is that judges are not selected primarily for this function. They are chosen presumably because of their legal knowledge, and not because of any familiarity with public utilities or methods of regulation, or of knowledge of the needs of the public. To impose a duty upon them which they are not fitted to perform, for which they were not chosen primarily, and which has no relation whatever to their legal duties, would be unwise. The universal experience in governmental administration is that the union of widely different functions in one person or body ordinarily results in inefficiency in some one direction or in every direction. In this case, either legal questions would be less wisely decided or public regulation would be inefficient.

In *Steenerson* v. *Great Northern Railway Co.*, 69 Minn., 353, 377, Mr. Justice Canty said, after referring to the peculiar qualities which members of commissions should have:

How is a judge, who is not supposed to have any of this special learning or experience, and could not take judicial notice of it if he had it, to review the decision of commissioners, who should have it and should act upon it? It seems to us that such a judge is not fit to act in such a matter. It is not a case of the blind leading the blind, but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing, and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question.

In this connection it is to be noted that one of the principal reasons for the creation of special administrative bodies to supervise corporations is that judicial methods and remedies have been neither effective nor satisfactory to the public. The long delays, the great expense, and the heavy burden upon the private citizen or organization, attending any attempt to force a corporation to do what is required by law, only in general terms, have made recourse to the courts quite impracticable. The private citizen is at a big disadvantage, and there have been few cases where he has tried his theoretical remedy. To give the courts the right to review the acts of administrative bodies exercising legislative functions would be a backward step and would increase the difficulties of securing proper relief. Corporations cannot be regulated by private lawsuits.

Judicial bodies are not well organized to regulate public service corporations. They are governed by strict rules of evidence. Their procedure usually spells delay. They pass only upon evidence presented to them. They have no permanent technical staff to make investigations and to assist them to analyze and digest the voluminous testimony often presented. The questions that arise are often so technical that expert assistance is necessary to a wise decision. Even if the investigation were made in first instance by an administrative body, and an appeal were provided to a court upon the question of reasonableness, whether the evidence justified the order, etc., the special knowledge of the administrative body would, in large measure, become of little value. The establishment of such an appeal would probably change the administrative body into a judicial body. But what is the use of a commission with a competent staff of experts, if a court with no such staff is to make the final decision, not only as to the law, but as to the facts and

their application to the conditions which surround an intricate case? The fundamental theory of public regulation by an administrative body is that it is a special function requiring special qualifications and knowledge upon the part of those who exercise it, a staff of technical experts, who are as familiar with the industries to be regulated as the corporations themselves, ample time and opportunity to investigate every subject, and sufficient authority to carry out the conclusions reached.

A few illustrations will suffice to show the burden which a careful review of the evidence will place upon the courts. A case relating to transfers between the various street-car companies in the Borough of Manhattan was recently closed before the Public Service Commission for the First District, N.Y. The record covers nearly 4,000 typewritten pages, including nearly 200 exhibits, many of which are elaborate statistical comparisons. In another case, relating to the reorganization of a company, about 2,400 typewritten pages of testimony were taken, including about 130 exhibits. It is evident that if a court is to analyze such a voluminous record and decide whether the commission wisely reached the conclusion appealed from, either other cases must wait, clerical and expert assistance must be had, or a decision must be reached without the careful examination necessary.

Broad court review will almost inevitably decrease efficiency. If a corporation may appeal to the courts because it believes an order is not justified by the record, and if it may secure a review of such evidence by a lower court and then by a higher court, a final decision may be put off and off, until the public is worn out and effective regulation greatly hampered. It is said that even under a system of judicial control limited to purely legal and constitutional questions, such a result may follow. True, but that is no reason for increasing the excuses for delay; and every time a new subject is added to the list upon which appeal may be taken, delay is facilitated.

The advantages accruing to a corporation from litigation are often so considerable that suits may be started even where the prospect of success is small. In the first place, it may pay to litigate; and it is not always feasible to require a company to

reimburse its patrons or consumers if it loses. In the case of service orders, if the court issues a stay but later sustains the order, the public has irretrievably lost the benefits from the better service it should have had while the litigation was proceeding. Information may be needed to decide a rate case; but if the company may contest the order for such data through the courts, and prevent a decision while that is being done, it is evident the receipts from the contested rates may more than offset the cost of litigation.

Secondly, the threat of a long contest in the courts may be used to secure a compromise. Complainants and commissions are apt to reason that it is better to accept a result which is less than the facts warrant, if by so doing an immediate settlement is obtained. This virtually places a reward upon belligerency and often prevents the public from securing that to which it is fairly entitled. Every means that contributes to that end is certainly undesirable.

Again, the complainant is at a decided disadvantage usually when the case goes into the courts. It is difficult and expensive for him to litigate. The interest of any one person is ordinarily small as compared with that of the corporation. But if there is to be an appeal to the courts, the complainants or the public ought to have an equal right to appeal from a decision that does not please them.

Another objection to the theory of broad judicial control is that it will tend to lessen responsibility. When administrators know that their decisions are final, so far as "reasonableness" is concerned, they will naturally exercise care and diligence. The centralization of responsibility increases the realization of this responsibility. But if they know that even in any unimportant matter an appeal may be taken, the tendency will be to transfer the responsibility to the courts and to reach conclusions hastily in order that the appeal may be taken immediately. It will also enable inefficient bodies to shift the responsibility for inefficiency upon the courts.

The rôle of the prophet is always hazardous and thankless, but one may safely predict that if a system of court review is generally adopted, whereby a corporation that is dissatisfied with any act or

order may appeal to the courts and thereby delay for a long period a final decision, and perhaps upset the conclusion reached by the administrative body because the court has a different opinion of what is wise, expedient, or warranted by the facts, a return may be made to legislative regulation which is subject to no such review, whenever it seems likely that advantage is to be taken of litigation to secure delay. The corporations have ample protection without unlimited review, and their real interests, as well as those of the public, do not lie in this direction. Further, if public regulation does not prove to be satisfactory, another and more radical remedy will certainly be tried.

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